

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FMC CORPORATION,)
)
Plaintiff,)
)
v.) C.A. No. 14-051-LPS-CJB
)
SUMMIT AGRO USA, LLC and SUMMIT)
AGRO NORTH AMERICA HOLDING)
CORPORATION,)
)
Defendants.)

[REDACTED]
[REDACTED]
REDACTED - PUBLIC VERSION

**DEFENDANTS' EMERGENCY MOTION FOR DISCOVERY IN CONNECTION WITH
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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Dated: July 8, 2014

This case is one of two related actions involving the same parties and the same set of operative facts. Pending here is plaintiff FMC Corporation’s (“FMC”) motion for preliminary injunction. The other action is an investigation currently pending before the International Trade Commission (the “ITC”). Last week, the ITC held a three-day evidentiary hearing on FMC’s motion for a temporary exclusion order (“TEO”) based on alleged patent infringement (from Tuesday, July 1 through Thursday, July 3). Both the preliminary injunction motion here and the TEO motion at the ITC require FMC to prove irreparable harm and that the balance of hardships and public interest weigh in favor of injunctive relief.

In light of the testimony taken last week at the ITC on the issues of irreparable harm, balance of hardships, and public interest, it has become apparent that the factual record on FMC’s motion for a preliminary injunction in this Court is inaccurate and incomplete.

A protective order governs the exchange of confidential business information at the ITC, and, absent FMC’s consent, or production pursuant to a discovery request, defendants here are unable to use the factual record developed at the ITC. Because the information belongs to FMC, however, nothing prevents FMC from making the same information available in this forum that was available to the ITC’s Administrative Law Judge. Indeed, FMC’s answering brief on the motion to stay proposes a cross-use agreement, permitting the parties to use the information developed at the ITC in this forum after the ITC action is complete.¹

¹ Summit asked FMC to agree to cross-use of the ITC factual record last Tuesday, July 1. FMC did not respond until yesterday afternoon, when FMC’s counsel asked Summit to identify the specific testimony Summit sought to use in this case. Yesterday evening, Summit provided a list of specific citations to the hearing transcript, witness statements, and trial exhibits (all of which could have been provided as early as July 4 if FMC had requested it). This morning, FMC’s counsel—who is, among others, counsel of record at the ITC—stated that FMC would oppose this motion, claiming that the list provided by Summit “is simply unworkable at this hour, particularly since it includes extensive exhibits, many (perhaps most) of which I do not have and have never seen.”

The factual information is material. While the ITC protective order prohibits disclosure of the nature of that information,² a public press release by FMC that issued on June 23 demonstrates the manner in which the record is now incomplete. Here, FMC argues that the alleged violations of the Lanham Act are likely to cause lost sales of FMC's products, including its Authority brand products, that contain the same active herbicidal ingredient, sulfentrazone, as defendant's Blanket 4F product. (D.I. 17 at 5, 18-19). Nonetheless, FMC acknowledged in its press release that "sales of Authority® brand soybean pre-emergent herbicides increased as expected." Exh. A. Further, FMC admitted that this sales increase occurred despite the fact that poor weather conditions led "to reduced application of pre-emergent products" like the Authority brands and Blanket 4F. *Id.* In other words, despite Summit's introduction of Blanket 4F into the market in 2013, and despite poor weather conditions that have led to reduced application of pre-emergent herbicides in 2014, FMC's sales of sulfentrazone-containing herbicides are actually *increasing* as FMC "expected." This directly undermines FMC's claim that the Blanket 4F labeling has—or will—irreparably harm FMC absent an injunction.

A preliminary injunction is a serious thing, and it should not be decided on a record that is inaccurate and incomplete. We have asked FMC to permit cross-use of the record developed at the ITC in connection with this proceeding, but FMC has refused to agree. Accordingly, Summit asks that the Court re-open fact discovery so that the parties can serve document requests that would allow development of the same factual record that already exists at the ITC or to simply order production of this material for use in these proceedings.

² FMC did permit defendants to make the characterizations contained in this motion.

Respectfully submitted,

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Exhibit A



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FMC Corporation Updates Second Quarter and Full Year 2014 Outlook

PHILADELPHIA, June 23, 2014 /PRNewswire/ -- FMC Corporation (NYSE: FMC) today announced that, as a result of weaker than expected performance in FMC Agricultural Solutions, the company expects second quarter adjusted earnings to be in the range of \$0.95 to \$1.05 per share. Additionally, the company now expects full-year adjusted earnings to be in the range of \$4.10 to \$4.30 per share.

Logo - <http://photos.prnewswire.com/prnh/20111101/NE97440LOGO>

The company previously reported that the prolonged cold weather in North America had delayed first quarter sales. When providing previous guidance, the company expected these weather conditions to abate and for a recovery of these sales to occur in the remaining quarters of 2014. However, the weather conditions persisted later into the second quarter than expected leading to reduced application of pre-emergent products. Although sales of Authority® brand soybean pre-emergent herbicides increased as expected, the increase was not enough to offset lower than expected sales of other products, particularly Capture® LFR corn insecticide.

In addition, the company reported that drought conditions in the Sao Paulo state of Brazil were delaying sales into the sugarcane segment. The company did not expect this drought to continue through the second quarter. These extended poor growing conditions have resulted in growers reducing their use of crop protection products. Furthermore, growers have significantly reduced the rate at which they are replanting, which has reduced the use of herbicides and insecticides in the sugarcane segment. The company does not expect conditions to improve in sugarcane during the remainder of 2014.

As a result of these factors, the company expects second quarter segment earnings for Agricultural Solutions to be up mid-single digits percent compared to the second quarter of 2013. For the full year 2014, revenues and operating earnings for the Agricultural Solutions segment are expected to increase by a mid-single digits percentage over 2013.

The company reaffirms its previous guidance for the Health and Nutrition and the Minerals segments for both the second quarter and the full year 2014. Second quarter segment earnings for Health and Nutrition are expected to be up low-teens percent primarily due to higher volumes driven by end market demand. Full-year segment revenue is expected to be up mid- to high-teens percent driven by higher volumes in texture and stability solutions, natural colors and binder product lines and contributions from the omega-3 product line. Full-year segment earnings are expected to be up mid-teens percent due to strong demand for functional ingredients and benefits from new omega-3 sales.

Second quarter segment earnings for the Minerals segment are expected to be up low-teens percent resulting from operating improvements in both the Soda Ash and Lithium businesses. Full-year segment revenue is expected to be up mid- to high-single digits percent driven primarily by increased volumes in lithium and soda ash and short- and long-term contracted price increases in soda ash. Full-year segment earnings are expected to be up high-teens percent, reflecting lithium margin improvements and more favorable contractual soda ash pricing versus 2013.

An updated Outlook statement, which includes current second quarter and full year guidance, can be found online at www.fmc.com.

FMC will release its second quarter 2014 earnings on Wednesday, July 30, 2014, after the stock market close via PR Newswire and the company's website at:

<http://www.fmc.com>.

The company will host a webcast conference call on Thursday, July 31, 2014, at 11:00 a.m. ET that is open to the public via Internet broadcast and telephone.

Internet broadcast: <http://www.fmc.com>

Passcode: FMC

Dial-in telephone numbers:

U.S. / Canada: (800) 288-8967

International: (612) 332-0345

Conference ID # 320938

A replay of the call will be available via the internet and telephone from 1:00 p.m. ET on Thursday, July 31, 2014 until Sunday, August 31, 2014.

Internet replay: <http://www.fmc.com>

U.S. / Canada telephone number: (800) 475-6701

International telephone number: (320) 365-3844

Enter Conference ID # 320938

About FMC

FMC Corporation is a diversified chemical company serving agricultural, industrial, environmental, and consumer markets globally for more than a century with innovative solutions, applications and quality products. In 2013, FMC had annual sales of approximately \$3.9 billion. The company employs approximately 5,600 people throughout the world, and operates its businesses in three segments: FMC Agricultural Solutions, FMC Health and Nutrition, and FMC Minerals. For more information, visit www.FMC.com.

Safe Harbor Statement under the Private Securities Act of 1995: Statements in this news release that are forward-looking statements are subject to various risks and uncertainties concerning specific factors described in FMC Corporation's 2013 Form 10-K and other SEC filings. Such information contained herein represents management's best judgment as of the date hereof based on information currently available. FMC Corporation does not intend to update this information and disclaims any legal obligation to the contrary. Historical information is not necessarily indicative of future performance.

SOURCE FMC Corporation

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 Contact Us

 Information Center

CERTIFICATE OF SERVICE

I, David M. Fry, hereby certify that on July 8, 2014, this document was served on the persons listed below in the manner indicated:

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Defendants.)

[PROPOSED] ORDER

At Wilmington this _____ day of _____, 2014, having reviewed Defendants' Emergency Motion for Discovery in Connection with Plaintiff's Motion for Preliminary Injunction;

IT IS HEREBY ORDERED that the motion is GRANTED.

United States Magistrate Judge